

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Schwartz, Herbert E. Attorney Ref.: 3124.006A
Serial No.: 10/598,223 Group Art Unit: 3774
Filed: August 22, 2006 Examiner: Levine, Joshua
Title: **ARTICULAR CARTILAGE FIXATION DEVICE AND METHOD**

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To: Mail Stop PETITIONS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Petition for Revival of an Application for Patent Abandoned Unintentionally
under 37 CFR 1.137(b)

Dear Madam or Sir:

By this Petition, the Applicant requests that the above-referenced patent application be revived pursuant to 37 CFR 1.137(b) because the application was unintentionally abandoned. The basis for this Petition is that the Office Action made Final mailed January 5, 2010 was not so-identified on its cover page. As a result, despite the Applicant's representative's sophisticated system of Office Action review and docketing and the Applicant's bona fide attempt to advance this application to allowance, the Applicant's representative was unaware of the July 5, 2010 six-month deadline to avoid abandonment.

This Petition is being filed in response to a Decision on Petition mailed on January 13, 2011 which "dismissed" the Applicant's Petition for Revival for an Application Abandoned Unavoidably which was filed on October 4, 2010. Since this present Petition is being filed on or before March 13, 2011, the filing of this present Petition was not delayed, except for consultation with the inventor, and is being filed promptly.

Pursuant to the requirements for filing such a petition as recited in 37 CFR 1.137(b) the Applicant's undersigned Agent submits:

Re: Petition to Revive - Unintentional
Attorney Ref. 3124.006A
Page 2

- (1)The reply required to the outstanding Office action: a Request for Continued Examination (RCE, the RCE fee was submitted on October 4, 2010 with the previous Petition) and Response to Final Office Action accompanies this Petition;
- (2) The petition fee as set forth in 37 CFR § 1.17(l);
- (3) The following statement and showing that the entire delay in filing the required reply from the due date for the reply was unintentional; and
- (4) Any terminal disclaimer required pursuant to paragraph 37 CFR 1.137 (d): not required since this utility application was filed after June 8, 1995.

Statement in Support of Petition to Revive

The entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional.

Showing that the Entire Delay was Unintentional

In support of this showing that the entire delay in filing the required reply was unintentional, the Applicant presents the following:

- A) A copy of the Office Action mailed January 5, 2010 is attached hereto as Exhibit A. As shown on the cover page of this Action, the Action was mailed on January 5, 2010 and, as indicated by the date stamp, received at the office of the Applicant's attorney, Heslin Rothenberg Farley & Mesiti P.C., on January 7, 2010. As is typical of the handling of non-Final Office Actions, the cover of the Office Action was docketed for a three-month response time of April 5, 2010 by the Applicant's attorney's docketing administrator. This docketing date reflects the docketing administrator's review of the "Office Action Summary" on page 2 of the Action, clearly indicating a check mark adjacent the statement "This action is non-final."

Re: Petition to Revive - Unintentional
Attorney Ref. 3124.006A
Page 3

- B) A copy of an earlier Office Action for this application mailed August 18, 2009 is attached hereto as Exhibit B. As shown on the cover page of this Action in Exhibit B, the Action was mailed on August 18, 2009 and, as indicated by the date stamp, received at the office of the Applicant's attorney on August 20, 2009. As is typical of the handling of Final Office Actions, according to the Applicant's attorney's docketing procedures, the cover of the Office Action in Exhibit B was docketed for a two-month response time of October 18, 2009; a "Final" or three-month response time of November 18, 2009; and a "Final Deadline Date" or six-month response time of February 18, 2010. This docketing date reflects the docketing administrator's review of the "Office Action Summary" on page 2 of the Action, which clearly indicates a check mark adjacent the statement "This action is FINAL."
- C) The procedure outlined in paragraph B) above clearly illustrates that were the Office Action mailed January 5, 2010 identified in its "Office Action Summary" as "This action is FINAL," under the Applicant's attorney's docketing procedures, the Applicant's attorneys would have docketed the 6-month due date of July 5, 2010 in order to avoid abandonment of this application. However, since the USPTO did not so identify the Office Action as "This action is FINAL," the Applicant's attorney's bona fide and diligent attempts to properly docket this due date were thwarted.
- D) On May 5, 2010, after holding a phone interview with the Examiner handling this application and the Examiner's SPE, and reaching some limited agreement on allowable subject matter, the Applicant's undersigned Agent filed a Response (attached as Exhibit C) with a Petition for one-month extension of time, in which the claims were amended in an attempt to recite subject matter consistent with the content of the phone interview.

Re: Petition to Revive - Unintentional
Attorney Ref. 3124.006A
Page 4

- E) Since the Office Action of January 5, 2010 was not identified as a "Final Office Action" on its "Office Action Summary" page, and the six-month due date was not docketed, the July 5, 2010 six-month deadline passed without notice. It was not until the receipt of the Advisory Action mailed September 21, 2010 (that is, over 2 months later than the 6-month deadline) did the Applicant's attorneys realize the possible fate of this application. The undersigned Agent's urgent phone messages left on September 24 and September 27, 2010 with the SPE who authored the Advisory Action were not returned. A phone conversation with Ms. Goodwin in the Office of Petitions on October 1, 2010 confirmed that the Office of Petitions would consider the filing of a petition such as this as one means for attempting to revive this application.
- F) The Applicant's undersigned Agent respectfully submits that a bona fide and diligent attempt has been made to advance this application to allowance. The undersigned Agent respectfully submits that the USPTO's oversight in properly identifying the January 5, 2010 Office Action as "Final" on its cover led to the unintentional abandonment of this application.

The Applicant requests that this Petition to Revive this application as unintentionally abandoned be granted and that the examination of this application proceed accordingly.

Respectfully submitted,



John Pietrangelo
Agent for Applicant
Registration No. 39,331

Dated: February 28, 2011

HESLIN ROTHENBERG FARLEY & MESITI, P.C.
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Re: Petition to Revive - Unintentional
Attorney Ref. 3124.006A
Page 5

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